

ENDORSED FILED
SAN MATEO COUNTY

NOV 30 2018

Clerk of the Superior Court
By R. Huerta
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE LLC,

Plaintiff,

vs.

FACEBOOK INC., et al.

Defendants.

Case No. CIV533328

**ORDER DENYING DEFENDANT
FACEBOOK, INC'S EX PARTE
APPLICATION**

Assigned for All Purposes to
Hon. V. Raymond Swope, Dept. 23

Hearing Date: Friday, November 30, 2018
Hearing Time: 2:00 p.m..
Dept.: 23

Action Filed: April 10, 2015

On November 19, 2018, the Court set a briefing schedule on defendant FACEBOOK, INC.'s ("Defendant" or "Facebook") ex parte application for expedited briefing on a motion for sanctions and contempt ("Defendant's Ex Parte") by email.

On November 20, 2018, the Court issued an Order for Briefing and Staying Submission of Unredacted Copies of Sealed Documents ("11/20 Order").

On November 26, 2018, the Court received Plaintiff SIX4THREE, LLC's ("Plaintiff" or "Six4Three") Response to the 11/20 Order at 11:35 a.m., Defendant's Ex Parte at 11:55 a.m., and Plaintiff's "Limited Response" to Defendant's Ex Parte at 4:46 p.m.

On November 27, 2018, the Court issued an Order and Notice of Hearing setting a hearing for November 30, 2018 at 2:00 p.m.

On November 28, 2018, the Court received Defendant's Response to the 11/20 Order at 7:02 p.m. and Plaintiff's Response to Defendant's Ex Parte at 7:06 p.m.

1 On November 29, 2018 at 2:31 p.m., Mr. Godkin sent a letter to both the Court and the
2 parties ("11/29 Letter"), a copy of which is attached as **Exhibit A**.

3 IT IS HEREBY ORDERED as follows:

4 Defendant's Ex Parte is GRANTED, IN PART, AND DENIED, WITHOUT PREJUDICE,
5 IN PART.

6 Defendant's ex parte request for expedited briefing and hearing on terminating sanctions and
7 contempt sanctions is procedurally improper. Notice must be given. (Code Civ. Proc. § 2023.030
8 ("the court, after notice to any affected party, person, or attorney, and after opportunity for hearing,
9 may impose . . . sanctions against anyone engaging in conduct that is a misuse of the discovery
10 process").) "Discovery sanctions may not be ordered ex parte, and an order purporting to do so is
11 void." (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208.)

12 Defendant's ex parte request for expedited requests for document production is procedurally
13 improper. No requests have been served on Plaintiff and the relief requested is premature.
14 Furthermore, a motion is required. (Code Civ. Proc. § 2031.260, subd (a) (response deadline to
15 requests for production is 30 days "unless on motion of the party making the demand, the court has
16 shortened the time for response"). See also Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial
17 (Rutter, Jun. 2018 Update) ¶ 9:349.) However, the court may issue an order shortening time pursuant
18 to ex parte application on any such motion. (Weil & Brown, *supra*, at ¶ 9:347.)

19 Defendant's ex parte request to shorten notices of deposition is GRANTED to five days upon
20 electronic service or personal delivery. (Code Civ. Proc. § 2025.270, subd. (d). See also Weil &
21 Brown, *supra*, at ¶ 8:493.3.) Notices of deposition on parties may include requests for production.
22 (Code Civ. Proc. § 2025.220, subd. (a)(4).)

23 Defendant's ex parte request to require the depositions of Plaintiff's *pro hac vice* counsel in
24 San Mateo County is DENIED. (Code Civ. Proc. § 2025.250, subd. (a).)

25 In ruling on the ex parte application, the Court takes no position on the issues of the waiver
26 of attorney-client privilege or the taking of depositions of any of Plaintiff's counsel as that issue is
27 not ripe for review. Notices of deposition, requests for production, and objections have yet to be
28 served.

1 The Court immediately orders that Plaintiff's counsel Stuart Gross of Gross & Klein shall
2 unmark all folders and files marked for deletion in the Six4Three Dropbox account to preserve all
3 files and folders. After unmarking, Mr. Gross shall then provide the administrator access log in and
4 password to the third party forensic examiner agreed to on the record, **Eric Friedberg of Stroz**
5 **Friedberg, or his agents, at (212) 981-6536 (office), (914) 329-9371 (mobile), or**
6 **efriedberg@strozfriedberg.com (e-mail) ("Forensic Examiner")**. Upon receipt of said
7 information, the Court immediately orders the Forensic Examiner to maintain chain of custody, take
8 all measures to restrict access to, and preserve the data from the Six4Three dropbox account,
9 including but not limited to imaging, for preservation of the evidence until further order of the Court.

10 The Court immediately orders that Mr. Theodore Kramer shall not open or access, in any
11 way, the laptop he used to access Defendant's Highly Confidential Documents and transfer those
12 files to the USB thumb-drive to Parliament until further order of the Court. (Weil & Brown, *supra*,
13 at ¶ 8:19:12. See Def. Response to 11/20 Order, filed Nov. 28, 2018, p. 7:13-15.)

14 The Court immediately orders that Mr. Kramer shall not open, access, modify, or delete any
15 storage or back-up devices for his laptop, whether in physical format ("physical storage devices")
16 (i.e. USB thumb-drive) or in the cloud ("cloud storage").

17 **Mr. Kramer, to be accompanied by Plaintiffs' counsel David Godkin and Stuart Gross,**
18 **shall make available for pick up at Gross & Klein, the Embarcadero, Pier 9, Suite 100, San**
19 **Francisco, CA 94111 - the laptop, all physical storage devices, identify in writing all cloud**
20 **storage, and provide any log-in information necessary for the full and complete access to all**
21 **data in the aforementioned to the Forensic Examiner no later than Friday, November 30, 2018**
22 **at 9 pm.** Defendant's counsel are permitted to be present for this pick up. The Forensic Examiner
23 shall pick up, maintain chain of custody, take all measures to restrict access to, and preserve the data
24 on the laptop, all physical storage devices, and cloud storage, including but not limited to imaging,
25 for preservation of the evidence until further order of the Court.

26 **Mr. Kramer, to be accompanied by Mr. Godkin and Mr. Gross, shall make his mobile**
27 **devices available and provide any log in information necessary for the full and complete access**
28 **for preservation of data on those devices to the Forensic Examiner at Gross & Klein no later**

1 **than Friday, November 30, 2018 at 9 pm.** The Forensic Examiner shall take all measures to
2 preserve the data on the mobile devices, including but not limited to imaging, for preservation of
3 the evidence until further order of the Court. Defendant's counsel are permitted to be present for
4 this data preservation by the Forensic Examiner. Upon completion of the imaging of the mobile
5 devices, the Forensic Examiner shall return the mobile devices to Mr. Kramer.

6 The Court orders Mr. Kramer shall not delete any data from his mobile devices, whatsoever,
7 until further order of the Court. If any of his mobile devices are set to automatically delete any data,
8 the Court instructs Mr. Kramer to turn off that setting.

9 The Court immediately orders that Mr. Thomas Scaramellino, who is a member of
10 Six4Three's legal team, shall not open or access, in any way, the laptop or computer he used to
11 access Six4Three's dropbox and that Mr. Scaramellino shall not open, access, modify, or delete any
12 physical storage devices or cloud storage for his laptop or computer.

13 **Mr. Scaramellino shall make available for pick up at the address provided by Mr.**
14 **Godkin, 2674 State Route 42, Forestburgh, NY 12777 - the laptop or computer, his physical**
15 **storage devices, and identify in writing all cloud storage and provide any log in information**
16 **necessary for the full and complete access to all data in the aforementioned to the Forensic**
17 **Examiner no later than Saturday, December 1, 2018 at 12 pm.** The Forensic Examiner shall pick
18 up, maintain chain of custody, take all measures to restrict access to, and preserve the data on the
19 laptop or computer, Mr. Scaramellino's physical storage devices, and Mr. Scaramellino's cloud
20 storage, including but not limited to imaging, for preservation of the evidence until further order of
21 the Court.

22 **The Court orders that the Forensic Examiner shall not disclose any data preserved or**
23 **collected in this action to any party, non-party, person or entity, until further order of the**
24 **Court.**

25 Mr. Kramer shall authenticate and produce full copies of the emails and attachments he
26 produced as exhibits to his declaration filed in support of Plaintiff's Brief in Response to the 11/20
27 Order, filed November 26, 2018, to Defendant **no later than December 1, 2018 at 9 a.m.** This shall
28 include, but is not limited, to the three attachments in Exhibit 1 ("Summary of Complaint.pdf,"

1 "FILED Corrected Opp to Individual Defendants Anti-SLAPP.pdf," "Requests for Production-
2 six4three.pdf") and text identified as hidden by "[Quoted text hidden]" at Exhibit 2, p. 2 and Exhibit
3 5, p. 2. (See Def. Response to 11/20 Order, *supra*, at p. 6:20-21.) **These emails and attachments**
4 **shall be bates-stamped for ease of future reference for both the parties and the Court.**

5 The provision for preservation of evidence in the 11/20 Order remains in effect and is
6 ordered extended to apply to any storage or back-up devices for any mobile devices, whether in
7 physical format or in the cloud (i.e. iCloud). (11/20 Order, *supra*, at p. 2:21 – 3:3.)

8 Good cause appears to order preservation of the aforementioned based on Mr. Kramer's
9 admitted actions, the cloud cast by Plaintiff counsel's change in narrative in the 11/29 Letter,
10 which is not supported by competent evidence (see 11/20 Order, ¶ 6), Plaintiff's counsel's assertion
11 that "it does not appear that Mr. Kramer's deletion of local copies of the documents from his
12 computer would affect any electronic evidence of his provision of documents, if any existed. It
13 appears that this information, if it existed, would be contained in the system log of his laptop."
14 (11/29 Letter, p. 2,), Mr. Kramer's admission he "[does] not recall the exact files [he] transferred"
15 (Kramer Dec. ISO Pl. Response to 11/20 Order, filed Nov. 26, 2018, p. 5:23-25), and for the
16 matters discussed on the record.

17 For discovery disputes, the parties are reminded of the discovery procedures set forth in CM
18 Order no. 1, paragraph 11. (See CM Order no. 14, ¶ 6.) Any request for a discovery conference shall
19 be delivered to Department 23 both electronically and in physical form.

20 Plaintiff's counsel shall all remain in this action until further order of the Court.

21 Mr. Godkin shall immediately provide a copy of this order to Mr. Scaramellino upon receipt.

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1 Lastly, the Court finds that although the summary of facts presented by Defendant in its Ex
2 Parte and Response to the 11/20 Order is compelling, it is not in affidavit form. (Code Civ. Proc.
3 § 1211, subd. (a). See Ex Parte, *supra*, at p. 2:24 -7:20; Def. Response to 11/20 Order, *supra*, at p.
4 1:10 – 4:5, 5:19 – 6:8, 9:3 – 10:5, 10:16 – 11:14.)

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6 IT IS SO ORDERED.

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8 DATED: November 30, 2018

9
10 **V. RAYMOND SWOPE**
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Honorable V. Raymond Swope
12 Judge of the Superior Court
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Exhibit A

November 29, 2018

BY EMAIL TO COMPLEXCIVIL@SANMATEOCOURT.ORG

The Honorable Judge Raymond V. Swope
Superior Court of California, County of San Mateo
Department 23, Courtroom 8A
400 County Center
Redwood City, CA 94063

Re: *Six4Three, LLC v. Facebook, Inc. et al*
Case No. CIV 533328

Dear Honorable Judge Raymond V. Swope,

We write, in advance of the November 30, 2018 hearing, to preliminarily address the following statement from your November 27, 2018 Order: "Mr. Kramer admits he . . . destroyed evidence of the transferred files by deleting all documents from his Dropbox account on the advice of counsel."

We never instructed Mr. Kramer or anyone else to destroy any evidence, we would never give that instruction, and we do not believe that any evidence has been destroyed.

We look forward to answering questions of the Court concerning this matter tomorrow, but in advance would like to provide some background that could assist such questioning.

Before November 19, 2018, the date on which the U.K. Parliament DCMS Committee served its first Order on Mr. Kramer, we did not know that Mr. Kramer was in London.

On the morning of November 20, 2018, we further discovered that a member of Six4Three's legal team, Thomas Scaramellino, had previously placed unredacted (nonpublic) pleadings and exhibits in a folder on a Dropbox account owned by Six4Three (the "Six4Three Dropbox Account") that Mr. Kramer could access. Mr. Kramer should not have had access to the folder. We therefore took immediate steps to ensure that Mr. Kramer could not access folders on the Six4Three Dropbox Account to which he was not permitted access under the Protective Order. We immediately instructed Mr. Scaramellino to move any folder(s) that contained highly confidential documents from the Six4Three Dropbox Account to a location that was established by Mr. Gross on his



firm's cloud file system.¹ The purpose of doing so was to cure the recently discovered breach of the Protective Order and to prevent any possible misuse of the documents. We did not intend to destroy evidence, and do not believe that any evidence was destroyed.

We are not aware of any readily accessible solution that allows for the automated transfer of files from a Dropbox account to a location on the system that Mr. Gross's firm uses.² Thus, the method of transfer used was to have Mr. Scaramellino transfer a local copy of the files that had been saved on his computer to the newly created location to which Mr. Kramer had no access. On November 21, 2018, we understood this transfer had been completed.³

We learned for the first time on November 23, 2018 that Mr. Kramer had provided confidential and highly confidential documents to the U.K. Parliament on November 21, 2018. This was also the first time that we learned that Mr. Kramer had the Six4Three Dropbox Account set up to sync its contents—including the folder(s) containing the documents in question that Mr. Kramer was not permitted to access—to the laptop that he had with him. This is referred to as a "local copy" of folders⁴. We were therefore concerned that Mr. Kramer still had access to the local copy of folders that he was not permitted to have on his laptop. We therefore took steps intended to remove the local copy from Mr. Kramer's laptop, and so we instructed Mr. Kramer to delete the local copy of the files and prevent any further access by Mr. Kramer to Defendants' confidential files. This instruction was not intended to destroy evidence, but to safeguard Facebook's confidential information from further disclosure.

We do not believe any evidence has been destroyed but remains readily accessible. We understood, at the time, that all of the confidential documents in the Six4Three Dropbox account that Mr. Kramer should not have been able to access had been by then transferred to the new location that Mr. Kramer could not access. We also understood that a local copy of all of the files was located on Mr. Scaramellino's computer, which was identical to the files that had been on Mr. Kramer's computer. Thus, to prevent the possibility of any further disclosures by Mr. Kramer and stop the continuing violation of the Protective Order, resulting from Mr. Kramer's access to the

¹ Mr. Kramer has testified that he provided the documents in question to the U.K. Parliament the next day, November 21, 2018, and there does not appear to be any dispute in this regard.

² To our knowledge the automated solutions that exist to accomplish such a transfer are at a very high enterprise level, meaning they are intended to facilitate the transfer of all of the files of a significantly-sized business from one system to another.

³ We discovered later that the "drag and drop" method that Mr. Scaramellino had used to effect the transfer—while appearing to him to have accomplished the transfer on November 21, 2018—had not done so. Thus, he used a different method that resulted in the transfer being completed on November 27, 2018.

⁴ Dropbox's syncing capability allows users to choose to have copies of documents that are saved on Dropbox's servers saved to the users' local computers. The service will then automatically update all of the copies of the documents (including those saved on Dropbox's servers and those saved on users' local computers).

Honorable Raymond J. Swope
November 29, 2018



documents, we confirmed with him that he no longer has any copies of confidential documents on his computer and did not have access to such documents via the Six4Three Dropbox Account. Again, this was done in no way with the intention to have him destroy any evidence of anything. It was done to put him in compliance with the Protective Order, which prohibited Mr. Kramer from having access to the documents in question, and to prevent the possibility of any further violation of the Protective Order or the Court's other Orders.

Regarding evidence of what documents Mr. Kramer provided to the U.K. Parliament, it would appear that such evidence would come principally in the form of testimony from Mr. Kramer and the persons to whom the documents were provided. We do not have the technical expertise to state for sure; however, it does not appear that Mr. Kramer's deletion of local copies of the documents from his computer would affect any electronic evidence of his provision of documents, if any existed. It appears that this information, if it existed, would be contained in the system log of his laptop.

Regarding the Six4Three Dropbox Account, we recently viewed its contents, and it appears that the documents in question have not, in fact been deleted. There are a number of folders that have been *marked* for deletion, but they have not actually been deleted. Our understanding is that these documents will not actually be deleted until some time passes or some further action is taken. We would like to unmark the folders for deletion, but we have not done so or made any changes, in light of the Court's order. We have also not opened any of the folders to confirm their contents. We would also like to change the password on the Six4Three Dropbox Account as further protection. We await further instructions from the Court in that regard.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'David S. Godkin'.

David S. Godkin

DSG:cam

Cc: Joshua Lerner, Esq.
Sonal Mehta, Esq.
Laurie Miller, Esq.
Catherine Kim, Esq.
Service-Six4Three
Stuart Gross, Esq.
James E. Kruzer, Esq.